



**Oloo v CMC Motors Group Ltd (Cause E050 of 2022)
[2024] KEELRC 691 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 691 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E050 OF 2022
CN BAARI, J
MARCH 19, 2024**

BETWEEN

DANIEL ADERA OLOO CLAIMANT

AND

CMC MOTORS GROUP LTD RESPONDENT

JUDGMENT

1. Mr. Daniel Adera Oloo, the Claimant herein, lodged a memorandum of claim against the Respondent on 8th December, 2022, seeking the following reliefs: -
 - i. A declaration that his termination was unfair, unlawful and unprocedural.
 - ii. Kshs 4,541,449/= in damages and terminal benefits.
 - iii. A certificate of service.
 - iv. In the alternative an order for reinstatement and redeployment.
 - v. Costs of the suit and interests.
2. In response to the claim, the Respondent entered appearance and filed a Response to the memorandum of claim dated 18th September, 2022. It generally denied the averments in the Claimant's claim.
3. The suit proceeded for hearing with the Claimant testifying on 9th October, 2023, and again on 16th October, 2023, when a Mr. Churchil Ombeta testified in support of the Respondent. Both the Claimant and the Respondent's witness adopted their witness statements and produced the documents filed in support of their respective cases as exhibits in the matter.
4. Parties thereafter filed written submissions.



The Claimant's Case

5. The Claimant states that the Respondent employed him on 28th May, 2004, as a Stores Clerk grade IV, at a starting salary of Kshs 13,508/-, a house allowance of Kshs 2,840/=.
6. It is his contention that he served diligently, with loyalty and dedication until 16th September, 2022, when he was dismissed without warning. He further states that at the time of his dismissal, his salary had risen to a gross of Kshs 83,402/=
7. The Claimant states that he reported to work as he usually did on 22nd August, 2022, when he was issued a show cause letter indicating that he reported to work drunk, resulting in his subsequent summary dismissal.
8. It is his case that his termination violated Sections 35(1)(c), (4), (5), 43, 44(4) and 45(2), (4) of the [Employment Act](#).
9. On cross-examination, the Claimant told court that he served the Respondent for 15 years. He further confirmed that he was taken through a disciplinary process, responded to the charges against him and cross-examined his accusers.
10. The Claimant confirmed on cross-exam that he went to work while not in a proper state of mind, but did his work well.
11. It is his prayer that the court awards him the reliefs listed in his memorandum of claim.

The Respondent's Case

12. It is the Respondent's case that the Claimant was indeed its employee between the year 2004 and 2022. The Respondent states that the Claimant was procedurally dismissed, having been given time to show cause, and which he did and that the disciplinary committee handling his case found no merit in his response to the show cause, resulting in his summary dismissal.
13. The Respondent further states that the Claimant was dismissed for coming to work drunk and for reason of insubordination.
14. The Respondent avers that the process and reasons for the Claimant's termination were valid and justified, based on its operational requirements.
15. The Respondent states that the Claimant's dues were paid upon his dismissal.
16. On cross-examination, the RW1 told court that the main reason for the Claimant's dismissal was for going to work drunk. He further told court that a complaint of insubordination was also lodged against the claimant.
17. RW1 further testified that the Claimant admitted going to work drunk, but did not produce minutes of the meeting indicating the admission. He further confirmed that he did not know whether the Claimant reported to work drunk on any other day other than the incident leading to his dismissal.
18. RW1's further testimony is that no warning was issued to the Claimant prior to the dismissal. It is his evidence that the Claimant was told to leave work on the day of the incident, and which he did.
19. The Court was further told that the Claimant was informed to appear for the hearing in the accompany of a representative, but he did not, and chose instead to appear alone.
20. The Respondent prays that the Claimant's claim be dismissed with costs.



The Claimant's submissions

21. The Claimant submits that Section 41 of the [Employment Act](#) was not adhered to prior to his dismissal. He sought to rely in the holding of the court in *Anthony Mkala Chitavi vs Malindi Water and Sewerage Co.* [2013] eKLR where the Court reiterated the tenets of procedural fairness as stipulated under Section 41 of the [Employment Act](#).
22. It is the Claimant's submission that no documentary evidence or witness testimony corroborated drunkenness and desertion. Furthermore, he avers that lack of evidence of an actual disciplinary hearing clearly points to the fact that there was no hearing.
23. The Claimant further submits that the Respondent did not prove that he was actually drunk at work. He states that no test results were availed. He had reliance in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR for the holding that: -

“ even in cases of serious breach of a contract as under Section 44(3) or on committing acts as outlined under Section 44(4) of an employee being absent from work, being intoxicated, negligent, abusive, failure to obey lawful orders, criminal arrests or charges, suspect in a criminal case, all these serious acts such an employee is subject to be treated as under Section 41 of the [Employment Act](#) with regard to being accorded a hearing.”
24. The Claimant contends that the burden was on the Respondent to prove propriety of the termination process by production of documentation such as disciplinary hearing minutes, which it did not. He had reliance in *Jane Achieng & another vs University of Nairobi* [2015] eKLR to buttress this position.
25. In respect of the fairness of the reason for termination, the Claimant submits that mere suspicion of intoxication was not reason enough to terminate. He further submits that Section 43 of the [Employment Act](#) behoves the Employer to prove the reasons for termination and Section 45 on proof that the reasons were valid and fair.
26. It is the Claimant's submission that he was entitled to 1 month pay in lieu of notice in accordance with Section 35 (1) (c) of the [Employment Act](#), given that no notice was given. He further placed reliance on Section 36 of the [Employment Act](#), to the effect that payment of the requisite due remuneration would dispense of the need for notice.
27. The claimant further urges this court to award him compensation for the unfairness of the termination. He relied in *Benjamin Langwen v National Environment Management Authority* [2016] eKLR for the holding that that a court's finding of unfair termination entitled a Claimant to remedies under section 49 of the [Employment Act](#), and that such termination entitles the employee to all terminal dues payable based on the gross monthly wage.
28. The Claimant further urges this court to consider the 19 years of service, the unjust and inequitable treatment, lack of a hearing, absence of notice and lack of payment of compensation/ dues in making an award for compensation.
29. The Claimant submits that Kshs 2,840/- paid on account of house allowance was too low, and thus sought for underpayments from 2004 to 2022.
30. The Claimant further submits that he is entitled to service pay on the strength of his dedicated service. Reliance is placed on the case of *Elijah Kipkoros Tonui v Ngara Operations T/A Bright Eyes Limited* [2014] eKLR.



31. It is the Claimant's submission that he was never compensated for public holidays and off-duty days. He sought to rely in *Peter John Mwangi Kamau vs Autolitho Limited* [2013] eKLR where the court held that a claim for pay in lieu of leave should be allowed if the employer fails to produce leave records, and that a bare statement on exhaustion of leave would not suffice.
32. The Claimant finally submits that he is entitled to a certificate of service based on his 19 years of employment and Section 51(1) of the *Employment Act*.

The Respondent's submissions

33. The Respondent submits that the Claimant was issued with a notice to show cause, invited for a disciplinary hearing and notified of the decision. It further urges the court to consider that in cross examination the Claimant alluded to being satisfied with the disciplinary proceedings.
34. It is the Respondent's submission that Section 47 of the *Employment Act*, lays the burden of proving unlawful termination on the employee; a burden which according to them the Claimant has failed to discharge.
35. The Respondent further submits that they were justified in dismissing the Claimant as he had admitted wrongdoing in his reply to the show cause, and at the disciplinary hearing.
36. The Respondent submits that there was no legal basis for the Claimant's claims in respect of unpaid allowances, accrued overtime, and compensation for holidays and public holidays. It submits that having been enrolled to NSSF the Claimant is not entitled to service pay.
37. In respect of pay in lieu of notice and compensation, the Respondent submits that there is no sufficient proof for the same.
38. In conclusion the Respondent urges the dismissal of the case, and further submits that in case of a contrary finding, then damages for unlawful termination should be capped at 3 months salary and 1 month pay in lieu of notice.

Analysis and Determination.

39. I have carefully considered the pleadings, the witnesses' testimonies and the submissions by both parties. Two issues present for determination: -
 - i. Whether the Claimant's termination was unfair, and
 - ii. Whether the Claimant is entitled to the orders sought.

Whether the Claimant's termination was unfair.

40. Section 41 of the *Employment Act* has set out the minimum standards for a procedurally fair termination/dismissal.
41. Up in the list of the essential requirements, is that the employer should explain to the employee in a language the employee understands the reasons for which the employer is contemplating terminating the services of the employee. Secondly, the employee is entitled to be accompanied by a fellow employee or shop floor union representative during the explanations and to finally hear any representations to be made by the employee.
42. In *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR the Court held that the *Employment Act* has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee



- may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present.
43. Further in *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
 44. It is not in dispute that the Claimant was issued with a show cause letter. The Claimant further confirmed responding to the show cause and appearing before the Respondent's disciplinary panel.
 45. The letter inviting the Claimant for the hearing, advised that he appears with a representative, contrary to his testimony that he was not allowed to have a representative present.
 46. Although the Respondent did not produce minutes of the disciplinary hearing, the Claimant acknowledged having attended the hearing which then confirms that indeed, the hearing took place leading to his summary dismissal on 15th September, 2022.
 47. Going by the events preceding the Claimant's dismissal and the totality of the evidence adduced, I do find that the Respondent complied with the tenets of procedural fairness and hold the dismissal procedurally fair.
 48. On the question of substantive justification, the issue is whether the reasons for the Claimant's dismissal are reasons the Respondent genuinely believed to exist as to cause it to dismiss the claimant.
 49. Sections 43, 45 and 47(5) of the *Employment Act*, requires that the employer proves the reasons for termination/dismissal, proves that the reasons are valid and fair and to finally justify the grounds for termination/dismissal.
 50. The reasons for the Claimant's dismissal, are indicated in the show cause letter as going to work under the influence of alcohol and insubordination. According to the Respondent the Claimant had by his own admission acceded to going to work intoxicated.
 51. In his submissions the Claimant averred that intoxication had not been proven. He contended that no test or documentary proof was produced to prove intoxication. RW1 on his part stated in testimony that the Claimant reported to work drunk and refused to take lawful instructions.
 52. The test for intoxication as provided for in Section 44 (4) (b) is that it must render the employee unwilling or incapable of performing his duties. Section 44 (4) also grants the employee leverage to dispute facts as alleged by the Employer regarding justifiability of the reasons for dismissal.
 53. It is thus clear that mere intoxication does not suffice as a ground for dismissal. The Claimant admitted on cross-exam that he partakes of alcohol. He further confirmed that he went to work on the material day and worked for his full shift.
 54. The Respondent did not lead evidence to show that the Claimant was so drunk that he was incapable of performing his duties. In *John Rioba Mugo v Riley Falcon Security Services Limited* [2016] eKLR, it was held that the employer must demonstrate that the alcohol consumed has rendered the employee incapable of performing his duties properly.
 55. The Respondent did not also show that it made effort to accommodate the Claimant if indeed, he was a known alcoholic.
 56. The allegation of intoxication, was thus in my view not sufficiently proven to have impaired the Claimant's performance at work, as to justify a summary dismissal.



57. The Respondent told the court that the other reason it dismissed the Claimant, was for reason of insubordination. It was alleged that the Claimant refused to take lawful instructions from his line manager. Refusal to obey lawful commands, renders an employee susceptible to summary dismissal as per the provisions of Section 44(4) (e) of the *Employment Act*.
58. Further, the exact nature, details and date of the alleged insubordination was not provided. These are details that are expected to be well within the Respondent's knowledge. It would have helped the Respondent's case if it called the line manager who was allegedly insubordinated to prove the allegation.
59. In the dismissal letter, the Respondent alluded to the Claimant threatening to resign on various occasions when assigned lawful tasks by supervisors. This allegation was likewise not corroborated by the line manager, or by any employee of the Respondent that was privy to the issue, and the minutes of the hearing were not produced in evidence to enable the court appraise itself of the discussions on the issue.
60. In the end, the vague nature of the evidence in support of the charge of insubordination, renders this court incapable of finding in favour of the Respondent. This reason for dismissal is therefore equally unreasonable, unfair and unjustified.
61. I conclude by finding the Claimant's dismissal unlawful, and therefore unfair for lacking in substantive justification.

Whether the Claimant is entitled to the remedies sought.

Compensation for unlawful termination

62. The Claimant sought to be awarded the equivalent of 12 months' salary as compensation for the unfair dismissal. This court's finding that the Claimant's summary dismissal was unlawful and unfair, entitles him to the award of compensation.
63. Compensation for unfair termination/dismissal, is by law capped at a maximum of 12 months' salary. Section 49(4) of the *Employment Act*, further provides 13 factors that guide the court in arriving at the appropriate award.
64. The length of service is one of the factors to be considered in making an award of compensation for unfair termination (See Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018] eKLR). The Claimant was in the service of the Respondent for about 18 years.
65. The Claimant in his testimony, admitted going to work intoxicated which goes to confirm that he contributed to his dismissal. Considering the Claimant length of service with the Respondent and his admission of wrong doing, I deem an award of 7 months' salary sufficient compensation for the unfair dismissal and which is hereby awarded.

Certificate of service

66. Issuance of a certificate of service is a statutory requirement prescribed under Section 51 of the *Employment Act*. An employee by this provision is entitled to a certificate of service irrespective of how he parted with the Respondent/employer.
67. The Respondent is hereby ordered to issue the Claimant a certificate of service with 14 days of this judgment.



Pay in lieu of notice

68. Having found the Claimant's dismissal unfair, it follows that he is entitled to notice and is hereby awarded 1 month's salary in lieu of notice.

Accrued overtime and annual leave.

69. The Claimant sought to be awarded on account of accrued leave for the 18 years that he was in the service of the Respondent.

70. The Respondent in its letter of summary dismissal, indicated that the Claimant had 39 days of leave not taken. It did not proceed to show that it paid the Claimant for the days nor lead any evidence to show that the Claimant utilized his leave days.

71. The Claimant's employment contract did not indicate the duration of leave that he was entitled to for every year of service, but instead, provided that leave days shall be per the CBA, which CBA was not produced in evidence.

72. The three-year limitation period, simply means that the Claimant would only be entitled to leave not taken in the last three years prior to dismissal. However, in the absence of prove of the leave entitlement per year of service, I proceed to award the Claimant for the 39 unutilized leave days and which were admitted by the Respondent.

73. No evidence was led to show that the Claimant worked overtime and that he was not paid for any overtime worked. In the premise, this claim fails and is dismissed.

Service pay

74. The payslip produced shows that the Claimant was contributing to NSSF. The Claimant was also making contribution to the Respondent's pension scheme as evidence by the pay slips produced. He is therefore not amenable to service pay, which is accordingly declined.

Public holidays

75. The Claimant did not lead any evidence in prove of this claim. The court was not told which public holidays and which years in his 18 years of service that the Claimant worked on public holidays. The claim therefore fails and is dismissed.

Reinstatement

76. The court has awarded the Claimant compensation for the unfair dismissal. The claim of reinstatement was an alternative remedy to compensation. To award this relief, would be unjustly enriching the Claimant. It fails and is dismissed.

77. In whole, Judgment is entered for the Claimant as against the Respondent as follows; -

- i. A declaration that the Claimant's dismissal was unlawful and unfair.
- ii. The Claimant is awarded 7 months' salary as compensation for unfair termination at Kshs 583,814/-
- iii. One month's salary in lieu of notice at Kshs. 83,402/-
- iv. 39 days of leave not taken at Kshs 108,423/-



v. Costs of the suit and interests at court rate until payment in full.

78. It is so ordered.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS
19TH DAY OF MARCH, 2024.**

C. N. BAARI

JUDGE

Appearance:

N/A for the Claimant

Mr. Indimuli present for the Respondent

Arwin Ongor- C/A

